STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2001B074

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON REMAND

KERBIN G. SHARP,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

This matter came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on November 4 and 25, 2002. Carol M. Caesar, Assistant Attorney General, represented respondent. Attorney Michael A. Hug represented complainant.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, respondent's action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether complainant's remedy is limited if he should prevail.

PRELIMINARY MATTERS

On September 14, 2001, a previous ALJ issued his Order Granting Motion To Dismiss and Initial Decision of the Administrative Law Judge, in which he granted

complainant's C.R.C.P. 41(b) motion and reinstated complainant to his former position.

On appeal, the State Personnel Board reversed the ALJ's Order and remanded this case for hearing in the following manner:

> After a lengthy discussion of drug testing, grounds for termination, and the need for a complete record, the Board voted to reverse the Order Granting Motion to Dismiss and Initial Decision of the Administrative Law Judge ("ALJ"). The matter is to be remanded to a new ALJ, due to the departure of the original ALJ from state service, for further proceedings in order to provide Complainant with an opportunity to put on his case and to complete the record regarding the issue of the agency violating its own procedural directives with respect to its obligation to provide rehabilitation.

On October 17, 2002, respondent filed a motion for summary judgment, arguing that complainant failed to create a genuine issue of material fact regarding whether the disciplinary action was arbitrary, capricious or contrary to rule or law, and that it was entitled to judgment as a matter of law. Complainant filed a written response to respondent's motion on October 28, 2002. Also on October 28, complainant filed a cross-motion for summary judgment, in which he argued that he was entitled to summary judgment on grounds that the undisputed facts were that respondent failed to obey its own policies and procedures in ordering two additional drug tests subsequent to the December 12 positive test that had led to the disciplinary action of December 29.

At hearing on November 4, 2002, the respective motions were argued and the parties agreed that there were no material facts in dispute and that this matter could be determined on a question of law. With the stipulation into evidence of certain facts and exhibits, the parties agreed that the record was complete and no other evidence was necessary to decide the case. The appointing

authority provided brief testimony, from which no relevant findings of fact can be made.

STIPULATED FACTS

1. Owen Leonard is the Regional Transportation Director, Region 3, located in Grand Junction, Colorado.

2. Leonard has the authority to issue disciplinary actions.

3. Complainant was employed as a welder in the maintenance division of CDOT. Sharp was required to possess a Commercial Driver's License (CDL) in his position, and was required to perform safety-sensitive functions. Persons employed by CDOT who are required to hold a CDL are subject to random drug testing.

4. Sharp has been employed by CDOT since 1986. He has worked in Region 3 since September 1999.

5. On April 9, 1997, Sharp received a corrective action for testing positive for amphetamines. Sharp was notified in the corrective action letter that further violations of the substance abuse policy by Sharp under any circumstances at any time in the future would not be tolerated.

6. On December 12, 2000, complainant was required to submit to a random drug test. His urine sample was determined not to be consistent with human urine by the testing facility.

7. Leonard instructed Bernie Lay, Region 3 Transportation Superintendent, to have Sharp submit to another drug test, and to place him on modified duty based upon the results of the December

12, 2000 drug test. Complainant was re-tested on December 19, 2000.

8. On December 19, 2000, Sharp was removed from all safety-sensitive functions, including driving any CDOT vehicle, commercial or otherwise, based on the results of the December 12, 2000 substituted sample. Sharp was also required to submit to another drug test on December 19, 2000.

9. As a result of the December 12, 2000 drug test, Leonard held an R-6-10 meeting with complainant pursuant to State Personnel Board Rules. The R-6-10 meeting was held on December 28, 2000. At this meeting, complainant admitted to substituting the sample.

10. Based upon the information available to him, Leonard issued a disciplinary action for the continued violation of CDOT's drug and alcohol policy in the form of an 8% reduction in pay for one year.

11. In the disciplinary action letter, Leonard specifically informed the complainant that this action did not preclude any action which may become necessary based on the results of the December 19, 2000 drug test. Complainant was also informed that any future positive drug test results would not be tolerated and would result in further disciplinary action up to and including termination.

12. On January 4, 2001, Leonard received the results of the December 19, 2000 drug test. It was positive for amphetamines. On January 5, 2001, Sharp submitted to another drug test. This test also came back positive for amphetamines.

13. On January 5, 2001, Sharp submitted to a return-to-duty drug test.[1] This test also came back positive for amphetamines.

14. Mr. Sharp was placed on administrative leave on January 16, 2001.

15. Leonard scheduled an R-6-10 meeting for January 23, 2001.

16. During the R-6-10 meeting, Leonard asked the complainant if he acknowledged the receipt of the results of the December 19, 2000 test as being positive for amphetamines, as well as the results of the January 5, 2001 drug test. Complainant acknowledged this information. Complainant also admitted at this meeting that he was continuing to use drugs.

17. Leonard determined that Sharp had violated CDOT Procedural Directive 1245.1.

18. Leonard took into consideration the corrective action in Sharp's file dated April 9, 1997 and the disciplinary action dated December 29, 2000, both involving the violation of CDOT Procedural Directive 1245.1.

19. Complainant received written notice of the disciplinary action by letter dated January 24, 2001. In this letter, Leonard set forth in detail his basis for his decision to issue the disciplinary action.

20. CDOT provided the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment services to Mr. Sharp.

[1] Sharp was on modified duty at this time, having been removed from all safety-sensitive functions, including driving.

21. Any back pay award would include benefits and minus offsets.

22. On September 19, 2002, Mr. Sharp was committed to the custody of the U.S. Bureau of Prisons for a term of 23 months.

23. Mr. Sharp was sentenced to McKeen, Pennsylvania Federal Prison on September 19, 2002.

In addition to these factual stipulations, the parties stipulated to the admission of Respondent's Exhibits 1 through 12 and Complainant's Exhibit D. The evidence from the original hearing was excluded, inclusive of the ALJ's findings. This constitutes a complete evidentiary record pursuant to the Board Order.

DISCUSSION

I. Summary Judgment

Summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." C.R.C.P. 56. The parties here stipulate that there are no genuine issues as to any material fact and argue that each is entitled to judgment as a matter of law. Inasmuch as the record is complete and there is no further evidence to be presented, both summary judgment motions are denied. The case is decided on the evidence submitted, which the parties stipulate constitutes the complete evidentiary record. Summary judgment is no longer proper when all the evidence is in. Rule 56 is designed to pierce through the allegations of fact in the pleadings and avoid an unnecessary trial. *Terrell v. Walter E. Heller & Co*., 439 P.2d 989 (Colo. 1968).

II. Arguments

Respondent argues that its action was not arbitrary, capricious or contrary to rule or law since the appointing authority followed the concept of progressive discipline and complainant was given prior warning that future positive drug tests would result in further disciplinary action up to and including termination of employment. When complainant submitted two additional positive drug tests and admitted at the subsequent predisciplinary meeting that he was continuing to use drugs, the appointing authority properly exercised his discretion to terminate complainant's employment.

Complainant argues that respondent's action was arbitrary, capricious or contrary to rule or law because the appointing authority lacked the authority to order the drug tests of December 19, 2000 and January 5, 2001 and, consequently, did not have the authority to terminate complainant's employment when those tests came back positive for amphetamines. He relies on CDOT Procedural Directive 1245.1,[2] which authorizes drug testing under the following circumstances: Pre-Employment Testing, Post-Accident Testing, Random Testing, Reasonable Suspicion Testing, Return-to-Duty Testing, and Follow-up Testing after a return to duty. (Exh. 3.) Pursuant to Directive 1245.1, before a safety-sensitive employee may return to duty he must be evaluated by a Substance Abuse Professional (SAP) and participate in any assistance program prescribed by the SAP. The SAP may recommend that both an alcohol and drug return-to-duty test be given. It is complainant's contention that he was not given time to participate in the rehabilitation prescribed by Directive 1245.1 before being dismissed, resulting in the agency's violation of its own rule.

[2] The stated purpose of Directive 1245.1 is, "To establish departmental procedures for incorporating the Colorado Substance Abuse Policy and ensuring conformance to the Omnibus Transportation Employees Testing Act (OTETA) of 1991, 40 CFR Part 382-40."

III. Analysis

Complainant's argument, in essence, is that the exclusionary rule should be applied to this proceeding, and the December 19 and January 5 drug tests should be suppressed from evidence because they were obtained illegally. Without evidence of those tests, there is no foundation for the disciplinary termination. Respondent counters with the assertion that, even without evidence of the latter two tests, the termination is sustainable because complainant admitted at the subsequent predisciplinary meeting that he continued to use illegal drugs. Yet, without the drug tests, there would have been no predisciplinary meeting. Framed in this manner, the issue becomes one of whether the exclusionary rule should be applied in this civil service employment proceeding.[3]

Our Supreme Court addressed this issue in *Ahart v. Department of Corrections*, 964 P.2d 517 (Colo. 1998). The question presented was whether to extend the exclusionary rule to civil hearings to terminate the employment of a correctional officer for admitted drug use. The court's reasoning is applicable to the present matter and is determinative of the outcome.

The exclusionary rule is a judicially created remedy intended to protect the constitutional right of privacy by deterring illegal police conduct. *Ahart*, *supra* at 519, citing *Wong Sun v. United States*, 371 U.S. 471 (1963). The United States Supreme Court "articulated the framework for identifying the civil cases in which it is appropriate to apply the rule" in *United States v. Janis*, 428 U.S. 433 (1976). *Id*. In order to determine whether to exclude the evidence, the *Janis* Court mandated a weighing of the deterrent benefits of excluding illegally seized evidence against the societal cost of losing relevant evidence. *Id*. The *Janis* test must be applied on a case-by-case basis. *Id*. The *Ahart*

[3] Although respondent does not concede that the tests were conducted without the requisite authority, there is nothing in this record demonstrating that they were authorized.

court applied the *Janis* analysis in declining to use the exclusionary rule to suppress evidence of marijuana use obtained in violation of the Fourth Amendment.

The analysis involves determining whether the agency action was "inter-sovereign" or "intra-sovereign," and whether the proceedings are "quasi-criminal." 964 P.2d at 520. An intra-sovereign action is one where the same governmental agency that committed the unlawful act seeks to use the evidence that it obtained. *Id*. In these cases, there tends to be a higher deterrent effect in excluding the evidence. *Id*. A civil proceeding is quasi-criminal when the purpose is to impose punishment for violation of the law. *Id*.

Here, as in *Ahart*, the agency action was intra-sovereign, increasing the likelihood of a deterrent effect on unlawful agency action if the evidence is suppressed. However, this is just one factor to consider. The *Ahart* court found as a mitigating factor a factual basis to "suggest" that the agency action was not taken in bad faith and was not so flagrant as to "shock the conscience of the court." 964 P.2d at 522. In the instant case, there is also a factual basis to suggest that the agency action was not taken in bad faith and does not shock the conscience of the court. It is undisputed that the random drug test of December 12, 2000 was authorized. When the testing facility concluded that complainant's urine specimen was inconsistent with human urine and did not perform the test, the appointing authority ordered that complainant be placed on modified duty (no driving) and be re-tested. The re-test of December 19 came back positive. The appointing authority then ordered a return-to-duty (full duty) test, which was taken on January 5, 2001 and which also came back positive for amphetamines. This is not shocking or bad-faith behavior by the appointing authority. His actions were case-specific. There is no evidence of similar agency conduct. It is unlikely that

excluding the evidence of the two failed tests would have a significant deterrent effect on future agency conduct.

The *Ahart* court concluded that the employment termination proceedings against a correctional officer were not quasi-criminal in nature because the discharge from employment was not intended to punish the employee for violating the law, but rather had the primary purpose of evaluating the employee's qualifications to hold the safety-sensitive position of correctional officer. 964 P.2d at 523. In a like manner, the proceedings against the present complainant were not quasi-criminal, since the purpose in dismissing him was not intended as punishment for a violation of law. Instead, the appointing authority decided that complainant could not fulfill the responsibilities of his safety-sensitive position in light of his continuing drug use. The appointing authority's purpose was to ensure the safety of complainant and his co-workers (Exh. 12), as well as of the driving public. The benefit of deterrence through the exclusion of evidence is diminished when the proceedings are not quasi-criminal in nature. 964 P.2d at 523.

Finally, the *Ahart* court considered the societal costs of excluding evidence of drug use by a correctional officer in termination proceedings. The court concluded that the effects of illegal drug use were incompatible with the qualities necessary for the successful job performance of a correctional officer, determining that the costs to society were substantial due to the safety-sensitive nature of the position. The court then held that the *Janis* balancing test weighed against exclusion of the evidence and allowed the evidence, upholding the termination. The same conclusion is reached here. The substantial societal costs weight the balancing against excluding evidence of continued use of illegal drugs and in favor of considering the evidence. This complainant, a welder, held a safety-sensitive position that required him to possess a Commercial Driver's License. The effects of illegal

drug use are "incompatible" with the qualities necessary for successful performance of the job.

IV. Conclusion

When the evidence of two additional positive drug tests and an admission of continued illegal drug use are taken into account, the action of dismissing complainant for continuing to violate the agency's drug policy is that of a reasonable and prudent administrator. He followed the concept of progressive discipline (R-6-2, 4 CCR 801). Termination was within the range of available alternatives. Respondent proved by a preponderance of the evidence that there was just cause for the discipline imposed. *See Dep't of Institutions v. Kinchen,* 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions).

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose was instituted or defended "frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless." This record does not support any of those findings. Accordingly, this is not a proper case for a fee award. *See also* R-8-38, 4 CCR 801.

CONCLUSIONS OF LAW

1. Respondent's disciplinary action was not arbitrary, capricious or contrary to rule or law.

2. The issue of complainant's remedy is irrelevant given the outcome.

ORDER

Respondent's termination action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ___ day of December, 2002, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is $50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of December, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON REMAND in the United States mail, postage prepaid, addressed as follows:

Michael A. Hug
Attorney at Law
515 Singing Hills Road, Suite 203
Parker, CO 80138

And through interagency mail, to:

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